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No. 82-940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

—v.—

KING & SPALDING,

Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF OF CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC., EQUAL RIGHTS ADVOCATES, INC., AND NOW LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petition for a Writ of Certiorari To The

United States Court Of Appeals

For The Eleventh Circuit

MOTION FOR LEAVE TO

FILE BRIEF AMICUS CURIAE

The NOW Legal Defense and Education Fund, Connecticut Women's Educational and Legal Fund, Inc., and Equal Rights Advocates, Inc. respectfully move this Court for leave to file the accompanying brief Amicus Curiae in support of the Petition for Certiorari submitted by Elizabeth Anderson Hishon. Together with Petitioner, we ask this Court to grant certiorari and review the decision of the Eleventh Circuit holding that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") is inapplicable to promotions to partnership within private law firms.

Consent to file the attached brief has been sought from the parties; while Petitioner has consented, King & Spalding has not. We therefore request permission

of this Court under Rule 36.

The Interest Of The Amici Curiae

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and education services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women, a membership organization of over 190,000 men and women in more than 700 chapters throughout the United States. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full

enforcement of laws prohibiting employment discrimination, most recently as amicus curiae in this Court in U.S. Postal Service v. Aikens, No. 81-1044.

Connecticut Women's Educational and Legal Fund, Inc. ("CWEALF") is a non-profit public interest law firm specializing in cases of sex discrimination. Since its inception in 1974, CWEALF has represented plaintiffs in numerous employment discrimination cases and has also been active in educating women about their legal rights in the workplace. CWEALF is strongly interested in maintaining Title VII as a broad remedial statute against employment discrimination.

Equal Rights Advocates, Inc., is a San Francisco based, public interest

legal and education corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. Equal Rights Advocates, Inc. has been particularly concerned with gender equality in the work force because economic equality is fundamental to women's ability to achieve equality in other aspects of society. This concern has been expressed through Equal Rights Advocates, Inc.'s representation of the plaintiffs in Berg v. Richmond Unified School District, 434 U.S. 158 (1977) and Kouba v. Allstate Insurance Co., 691 F.2d 873 (9th Cir. 1982) as well as its participation as amicus curiae before this Court in U.S. Postal Service v. Aikens, No. 81-1044.

Amici share a commitment to ending discrimination against women in all areas of the work force, including the professions. They bring to this case their extensive experience in the litigation of employment discrimination cases covering a wide range of occupations. Amici believe that their brief will highlight for the Court the importance of this case in the continuing effort to secure full economic equality for all women.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC., EQUAL RIGHTS ADVOCATES, INC., AND NOW LEGAL DEFENSE AND EDUCATION FUND

Amici respectfully ask that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in the above-captioned case.

Opinions Below

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 678 F.2d 1022 (1982). The opinion of the United States District Court for the Northern District of Georgia is unofficially reported in 25 Empl. Prac. Dec. (CCH) ¶ 31,703 (N.D. Ga. 1980), and is reproduced in the Appendix submitted by Petitioner Elizabeth Hishon.

Jurisdiction

The jurisdiction of this Court was invoked under 28 U.S.C. § 1254.

Interest of the Amici Curiae

The interest of the Amici is stated in the "Motion for Leave to File Brief Amici Curiae", supra.

Statutory Provisions Involved

Title VII provides in pertinent part:

"Definitions

> (a) The term 'person' includes ... individuals, governments, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, ... or receivers.
>
> (b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees ... "
>
> Section 701(a), (b), 42 U.S.C. § 2000e(a), (b) (emphasis supplied).
>
> "Unlawful Employment Practices
>
> (a) It shall be an unlawful employment practice for an employer

> (1) ... to discharge any individual, or otherwise to discriminate against any individual with respect to ... terms, conditions or privileges of employment, because of ... race, color, religion, sex, or national origin; or
>
> (2) to limit ... employees ... in any way which would deprive or tend to deprive any individual of employment opportunities ... because of ... race, color, religion, sex, or national origin."
>
> Section 703(a)(1), (2), 42 U.S.C. § 2000e-2(a)(1), (2).

Statement of the Case

Petitioner, Elizabeth Anderson Hishon, was employed as an associate by the law firm of King & Spalding. She was denied partnership by the firm and, pursuant to the firm's "up or out" policy, was discharged in 1979. She brought suit under Title VII charging discrimination on the basis of sex.

The District Court for the Northern District of Georgia, after refusing to grant discovery on the merits, dismissed Ms. Hishon's complaint under Fed. R. Civ. P. 12(b)(1). Reasoning that "a professional partnership is like a marriage," the court held that, as a matter of law, Title VII did not govern decisions to promote an associate in a law firm to partnership. As the District Court put it:

> "To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings." 25 Empl. Prac. Dec. (CCH) ¶ 31,703 at 23,062 (N.D. Ga. 1980).

On appeal, the Court of Appeals for the Eleventh Circuit affirmed, over the vigorous dissent of Circuit Judge Tjoflat. Sharing the District Court's concern not to intrude on the rights of "voluntary association" of law firms, the Court of Appeals construed Title VII

narrowly. It held that promotion to partnership was not a "term, condition or privilege of employment" protected by section 703(a)(1) or an "employment opportunity" protected by section 703(a)(2). Moreover, the Court held, King & Spalding's "up or out" policy -- pursuant to which Ms. Hishon's denial of partnership was tantamount to a discharge from the firm -- was not covered by the discharge provisions of Title VII. Although it acknowledged that the only other federal court to have considered these issues had held precisely the opposite, Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977), the Court refused to follow Lucido. Conceding that a dismissal under Fed. R. Civ. P. 12(b)(1) is only proper when "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim, which would entitle [her] to relief," the Court held:

> "Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association." 678 F.2d at 1026.

Summary of Argument

The Court should grant certiorari for several reasons. First, the Eleventh Circuit decision conflicts with the Congressional mandate embodied in Title VII and with the only other Court decision on point. Second, the Eleventh Circuit's decision will have a substantial and far-reaching effect because it carves out from the scope of Title VII a substantial, and unwarranted, exemption for partnerships which have a practice of filling at least some partnership positions by promoting associates from within the firm. Since the partnership form is used by many business entities -- not simply law firms --

and these entities also choose partners from among their employees, the logic of the Eleventh Circuit's decision could deny to employees in a great many businesses the protections of Title VII. Finally, the Eleventh Circuit decision is wrong, relying on a mistaken view of the associational rights of partnerships like King & Spalding.

POINT I

THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE CONGRESSIONAL MANDATE AND WITH THE ONLY OTHER COURT DECISION ON POINT

A. The Eleventh Circuit's decision conflicts with the Congressional mandate

Congress has prohibited partnerships from discriminating against minorities or women with respect to "terms, conditions, or privileges of employment," and "employment opportunities." 42 U.S.C. § 2000e-

-2(a)(1), (2).* In a partnership like King & Spalding, which follows the practice of filling partnership positions by promoting associates from within the firm, a promotion to partnership is a "term, condition or privilege of employment" and an "employment opportunity" within the meaning of Title VII. In addition, in those partnerships which share with King & Spalding an "up or out" policy, the forced departure is a discriminatory discharge also covered by the statute.

In adopting Title VII, Congress intended a broad remedial statute which would reach employment discrimination in

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* Under Title VII, "employers" may not discriminate. 42 U.S.C. § 2000e-2(a)(1). An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees ...." 42 U.S.C. § 2000e-2(a), (b). The term "person" includes "partnerships." 42 U.S.C. § 2000e(a), (b).

all but its most insignificant manifestations. The statute banned "all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." County of Washington v. Gunther, 452 U.S. 161, 178 (1981), quoting Franks v. Bowman Transportation Co., 424 U.S. 757, 763 (1976). Included are discriminatory promotion practices. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). This Court, in keeping with the Congressional mandate, has construed Title VII broadly to achieve its remedial purpose.

The courts have uniformly held that Title VII prohibits discrimination in promotions not merely to rank and file but also to middle and upper echelon positions. See, e.g., Payne v. Travenol Labs, 673 F.2d 798 (5th Cir. 1982) (Title VII

applies to promotions to technical, managerial and executive level jobs); Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980) (Friendly, J.) (Title VII applies to tenure decisions); Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980) (tenure decisions); Gilmore v. Kansas City Terminal Railway Co., 509 F.2d 48, 51 (8th Cir. 1975) (managerial and supervisory positions); Pinckney v. County of Northampton, 512 F. Supp. 989 (E.D. Pa. 1981), aff'd, 681 F.2d 808 (3rd Cir. 1982) (executive positions); Ste. Marie v. Eastern Railway Ass'n, 458 F. Supp. 1147 (S.D.N.Y. 1978), rev'd on other grounds, 650 F.2d 395 (2d Cir. 1981) (top management and executive positions); Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F. Supp. 305 (S.D.N.Y. 1972) (executive positions). See also Bartholet, Application of Title VII to

Jobs in High Places, 95 Harv. L. Rev. 945 (1982).

Congress made no distinction between professional and nonprofessional employment, making discriminatory practices in both illegal. Accordingly, promotions in professional employment situations are covered by Title VII.*

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* Congress' intent to include professional employment within the scope of Title VII is clear from the legislative history available. Senator Javits, in opposing an amendment that would have excluded hospital-employed physicians from Title VII coverage said:

> "One of the things that those discriminated against have resented the most is that they ... cannot ascend the higher rungs in professional and other life.
>
> "Yet this amendment would ... reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion -- [among] physicians or surgeons, one of the highest

(footnote continued)

In addition to the language and legislative history of Title VII, no logical distinction exists for excluding from Title VII coverage advancement to partner

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rungs of the ladder that any member of a minority could attain -- and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority ... that they have to be subject to discrimination ... and the Federal law will not protect them."118 Cong. Rec. 3802 (1972).

The amendment was defeated. See also EEOC v. Rinella & Rinella, 401 F. Supp. 175, 179-81 (N.D. Ill. 1975) ("[t]he courts ... have found little distinction between professional and nonprofessional job situations, concluding that, since the primary objective of Title VII is the elimination of the major social ills of job discrimination, discriminatory practices in professional fields are not immune from attack"); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 126 (S.D.N.Y. 1977) ("Congress clearly included in the objectives of Title VII the elimination of job discrimination in professional fields including law ..."); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), app. dis., 496 F.2d 1094 (2d Cir. 1974).

at a partnership like King & Spalding while including promotions to upper level jobs in corporations or universities. The possibility of promotion in a corporation or award of tenure in a university acts as an inducement to attract talented individuals to accept the institution's offer of employment and to do well once they are there. Similarly, the possibility of advancement to partner attracts associates like Ms. Hishon to the firm and motivates them to work hard. According to the record in this case, Ms. Hishon and other associates were persuaded to accept employment by King & Spalding by the promise that they would be considered for partnership on a non-discriminatory basis after five or six years of employment. Complaint ¶ 8(b). See also Answer ¶ 8(b) ("... all associates are employed with the expectation that they will be considered

for ... partnership ... within a reasonable period of time ...").* Associates' work at King & Spalding was evaluated annually in terms of their progress toward partnership. Complaint ¶ 8(c). See also Answer ¶ 8(c) (King & Spalding admits this). King & Spalding's practice was to promote associates who received appropriate evaluations to partner. Complaint ¶ 8(d). See also Answer ¶ 8(b) (King & Spalding admits that associates who "meet the firm's standards for partnership" are promoted). In addition, King & Spalding's practice was to require associates who were not promoted to partner to seek employment elsewhere. Answer ¶ 9. These

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* While only the allegations in the complaint need be taken as true for the purpose of this certiorari petition, see Conley v. Gibson, 355 U.S. 41 (1975), the promotion practices we address are admitted by King & Spalding, as we show in the text.

practices make advancement to partner a promotion like any other promotion. Thus, advancement to partner is within the meaning of "terms, conditions and privileges of employment" and "employment opportunities," and is covered by Title VII. See Lucido, 425 F. Supp. at 127-28. See also cases cited supra at 10. The Eleventh Circuit's decision to the contrary is clearly wrong.

B. The Eleventh Circuit's decision conflicts with the only other court decision on point

The only other reported Title VII decision involving promotion to partnership squarely contradicts the Eleventh Circuit's decision. Lucido, supra, 425 F. Supp. 123 (S.D.N.Y. 1977). In Lucido, the Court held that promotion to partnership is a "term, condition or privilege of employment" and an "employment opportunity" within the meaning of Title VII. The

Eleventh Circuit in Hishon conceded that Lucido was conflicting authority but expressly rejected its holding. 678 F.2d at 1029.

Lucido was more persuasively reasoned. In Lucido, the law firm argued that since Title VII did not apply to the relationship among the partners themselves, it could not apply to the process by which an associate attorney becomes a partner. The court responded that, even assuming that Title VII does not apply to the partners themselves, it does apply to the employer/employee relationship between the firm and the associate. Any discrimination that occurs with regard to a promotion opportunity -- while that employer/employee relationship continues -- is covered by Title VII. 425 F. Supp. at 128. Cf. NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953) ("immaterial

that the protection ... afforded was calculated to enable him to obtain a position in which he would no longer be protected"). See also Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

The issues that divide the Hishon and Lucido courts promise to recur, since lawsuits alleging discrimination by law firms are common. See, e.g., Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974); Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975); EEOC v. Rinella & Rinella, 401 F. Supp. 175 (D.C. Ill. 1975). Moreover, the logic of the Eleventh Circuit's opinion has far-reaching implications for other professions.

Point II

THIS CASE PRESENTS LEGAL ISSUES OF FAR-REACHING IMPORTANCE

The Eleventh Circuit's decision -- that Title VII does not cover promotions to partnership within law firms like King & Spalding -- presents legal issues of far-reaching consequences. Discrimination within such law firms against women and minorities, an entrenched pattern historically, remains a serious problem today.*

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* Cf. Epstein, Women in Law 15 (1981) ("Prejudice against [women and blacks] was of a different quality than that against men of ethnic and religious minority backgrounds because common cultural attitudes held that they had basic incapacities for professional work, and their race and sex statuses -- their physical attributes -- could not be concealed"); C.P. Clark, Minority Opportunities in Law for Blacks, Puerto Ricans & Chicanos 6 (1974) ("The world of the large, private firm has opened up somewhat; however, few are getting equal opportunity"); P. Hoffman, Lions in the Street 138-39 (1973) ("In 1971, nine women law students and recent graduates of Columbia and N.Y.U. filed

(footnote continued)

Exempting such law partnerships from the scope of Title VII promises to exacerbate that problem. While the problem is undoubtedly less severe than it once was, the vestiges of sex and racial discrimination persist -- particularly in the

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a sex-discrimination complaint with the city's Commission on Human Rights against ten law firms, including such pillars of the Legal Establishment as Cravath, Shearman & Sterling, Sullivan & Cromwell and Winthrop Stimson. ... After a year-long investigation, the Human Rights Commission issued its findings of the first firm studied -- Royall Koegel. It found a 'pattern and practice' of discriminatory recruitment, hiring, promotion and treatment of women attorneys"); E. Smigel, The Wall Street Lawyer 46 (1969) ("While most large law offices now do have some women in their organization, very few become partners"); Paone and Reis, Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers, 40 So.Cal. L.Rev. 615, 616-19 (1967) ("The few available studies on law firm discrimination indicate that the large firms, considered highly desirable by superior law students, exercise the most blatant discrimination in the legal profession").

realm of partnership decisions. In one recent survey, it was noted that among the 150 or so largest law firms, 32 had no women partners, and 29 more had only one or two. Flaherty, Women & Minorities: The Gains, The National Law Journal, Vol. 5, No. 15, December 20, 1982, p. 8. Moreover, 106 of the firms had no black partners, and fully 133 of them had no Hispanic partners. Plainly, partnership decisions remain a focal point for the struggle against discrimination.

Moreover, an exception to Title VII for promotions to partnership like King & Spalding would not simply affect law firms. Partnership is a common form of business organization, in particular of accounting firms, advertising agencies and brokerage houses. It is also used in industry, forestry, agriculture, fishing, mining, construction, manufacturing, tran-

sportation, public utilities, wholesale and retail trade, finance, insurance and real estate. The total number of partnerships in the United States is approximately 1,153,000. U.S. Bureau of the Census, Statistical Abstract of the United States: 1981 at 535, chart 899 (102d ed. 1981).

In accounting firms, partnerships are often large, multi-million-dollar businesses which employ thousands of people. As of 1981, the "big eight" accounting firms together had approximately 7,000 partners and accumulated total revenues of over $6 billion. See The Year of the Accountant, New York Times, Business Section (January 3, 1982). As this Court aptly observed in Bellis v. United States, 417 U.S. 85, 93 (1970), "[s]ome of the most powerful private institutions in the Nation are conducted in the partnership form."

An exception to Title VII for promotions to partnership thus promises to exempt more than just law firms from coverage under the Act; it would also leave unprotected a substantial part of the non-legal workforce. Moreover, because it is a simple matter for companies to adopt a partnership form, businesses -- given an opportunity to elude the obligations of Title VII -- will have an incentive to organize, or reorganize, as partnerships. Plainly, the Eleventh Circuit's decision opens the door to a pervasive circumvention of the law.

Point III

THE DECISION OF THE ELEVENTH CIRCUIT RELIES ON A MISTAKEN VIEW OF THE ASSOCIATIONAL RIGHTS OF PARTNERSHIPS

In holding that Title VII does not govern promotions to partnership within law firms, the Eleventh Circuit professed

an inability to "find the requisite Congressional intent to permit Title VII's intervention into matters of voluntary association." 678 F.2d at 1026. Concerned with the "associational" interests of law firms, the Circuit Court construed the language of Title VII narrowly, declining, for example, "to extend the meaning of 'employment opportunities' beyond its intended context by encroaching upon individuals' decisions to voluntarily associate in a business partnership." Id. at 1028. The Circuit Court's concern with associational interests was misplaced.

A. Congress intended no such "associational" exception to Title VII

The Eleventh Circuit carved out an exception to Title VII for law firm partnerships -- in deference to the firms' supposed right of voluntary association. This "associational" exemption from the

scope of Title VII was not contemplated by Congress. Indeed, when Congress intended to create "associational" exceptions to Title VII, it did so directly and unambiguously.

Thus, when Congress wished to protect the interests of private clubs and religious organizations, it provided specific exceptions to Title VII. See 42 U.S.C. § 2000e(b)(2) (excluding private clubs from coverage); 42 U.S.C. § 2000e-1 (allowing religious organizations to discriminate in favor of co-religionists). Similarly, by exempting enterprises having fewer than fifteen employees from Title VII coverage, Congress again recognized -- through express statutory provisions -- the as-

sociational interests of small organizations. See 42 U.S.C. § 2000e(b).*

Congress included no similar exception for law firm partnerships. Had it intended such an exemption, Congress certainly knew how to create one.

B. In any case, the Eleventh Circuit misapplied settled principles of "associational" law.

Besides ignoring the intent of Congress, the Eleventh Circuit overlooked

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* As Senator Humphrey noted during the debates on Title VII, when businesses exceed the statutory limit of employees, as a practical matter "they ... lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13088 (1964). See also 42 U.S.C. § 2000a-(b)(1) (exempting owner-occupied establishments with five or fewer rooms for rent from the public accommodations provisions of Title II of the Civil Rights Act of 1964); and 42 U.S.C. § 3603(b)(2) (exempting "Mrs. Murphy's boarding house" from the provisions of the Fair Housing Act of 1968).

settled legal principles governing free association. In the view of the Circuit Court, the freedom to associate outweighs the anti-discrimination policies of Title VII. Yet, this Court has expressly held in other contexts that acts of discrimination may not be justified in the name of free association. As the Court held in Norwood v. Harrison, 413 U.S. 455, 470 (1977):

> "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."

Similarly, in Runyon v. McCrary, 427 U.S. 160, 176 (1976), this Court stated:

> "it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desir-

> able.... But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."*

The Eleventh Circuit's reliance on associational rights was thus excessive -- starkly so. The freedom to associate is not absolute. CSC v. Nat'l Assoc. of

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* Cf. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964) (upholding constitutionality of the public accommodations provisions of Title II of the Civil Rights Act of 1964):

> "The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no 'right' to select its guests as it sees fit, free from governmental regulation."

See also Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945) (due process does not prohibit state from banning racial discrimination in union membership).

Letter Carriers, 413 U.S. 548, 567 (1973). Governmental policies intended to further a compelling state interest -- such as Title VII -- may justify restrictions on associational interests. A balance must be struck between conflicting policies. For example, the interest in effective government justified restrictions on the associational rights of federal employees. CSC v. Nat'l Assoc. of Letter Carriers, supra. Similarly, the interest in avoiding the actuality and appearance of political corruption was held to justify limitations on the associational rights of campaign contributors. Buckley v. Valeo, 424 U.S. 1, 24-28 (1976). In contrast, the Circuit Court resolved the conflict between Title VII and rights of association by simply eliminating the statute from its calculus, simply ignoring this Court's frequent

recognition of the need to balance competing interests.

The Eleventh Circuit's excessive solicitude for associational rights is particularly misplaced where, as here, it is a commercial enterprise -- a law firm -- whose associational interests are at stake. There is much in the opinions of this Court to suggest that entities do not enjoy the same measure of First Amendment protection in their commercial activities as they do in their political speech and associations. Two recent cases -- both involving associational claims -- put the issue squarely. In In re Primus, 436 U.S. 412 (1978), the Court set aside a disciplinary reprimand issued to a South Carolina attorney accused of improperly soliciting a client. On behalf of the ACLU, the attorney had arranged to represent a woman who had been sterilized as a

condition of her continued receipt of Medicaid payments. Relying on NAACP v. Button, 371 U.S. 415 (1963), this Court held that the attorney's representation was political expression, protected by her right of association under the First Amendment. In so ruling, the Court expressly distinguished "traditional fee-paying arrangements" and noted that the representation in Primus could not be viewed as "motivated by considerations of pecuniary gain rather than by ... [the] goal of vindicating civil liberties." 436 U.S. at 429-30.

On the same day, this Court decided Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). Again, an attorney had been disciplined for improperly soliciting clients. In Ohralik, however, unlike in In re Primus, the solicitation had no elements of political expression; it was

commercial enterprise -- pure and simple. Noting that commercial expression does not enjoy the same protection as political expression, the Court upheld as proper the attorney's suspension. 436 U.S. at 455-56. As the Court explained:

> "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." Id. at 459.

This lesser degree of protection for associational interests growing out of commercial activity was also a basis for the Court's decision in Lucido.*

Title VII prohibits, inter alia, sex discrimination in employment. It does not

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* Cf. Kunda v. Muhlenberg College, 621 F.2d 532, 547-51 (3d Cir. 1980); Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980) (Friendly, J.).

inhibit a partnership's traditional exercise of discretion in the non-discriminatory selection of new members. The Lucido court recognized this principle and correctly applied it. The Eleventh Circuit, however, incorrectly viewed Title VII as wholly subordinated to partnerships' associational claims.

Conclusion

The Eleventh Circuit has carved out a substantial exception from the reach of Title VII -- one of the centerpieces of civil rights legislation. That exception, for promotions to partnerships, is neither founded in Congressional intent nor justified by applicable case law. It represents, in fact, an unprecedented, unwar-

ranted dilution of the hard-won rights of women and minorities.

Amici respectfully ask that this Court grant certiorari.

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Respectfully submitted,

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